IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.23 OF 2006

Shivaji Balgonda Patil ...Appellant

Vs.

Narayan Mahadeo Bhandare & Ors. ...Respondents

Mr.Umesh Mankapure for the Appellant
Ms Leena Patil i/b Mr.P.M.Pradhan for the Respondents.

CORAM: A.S.OKA, J.
DATED: MAY 5,2006.

P.C.:

1. Heard the learned Advocates appearing for the parties. The learned Advocate for the Appellant submitted that even assuming that there is an easementary right in favour of the Respondents, the same has been extinguished. He submitted that the findings of the Appellate Court are perverse. He submitted that in the counter claim right of easement was claimed by the Respondents and the said counter claim was dismissed. He submitted that the decree passed in the counter claim was not challenged by the Respondents.

2. I have considered the submissions. So far as counter claim is concerned, the grievance appears to be as regards encroachment made on the common lane. It was the Appellant-Plaintiff who approached the Civil Court with a prayer for injunction restraining the dismantling of the wall

shown between point No.A and B on the map annexed to the plaint. The sale deed dated 14th March 1961 clearly shows the existence of a common passage through the property of the Appellant. The Appellate Court has recorded a categorical finding in paragraph 22 of its Judgment which reads thus :

"22. There is property bearing CTS No.1533 towards southern side of and adjacent to the open space which is in east west direction. There is public road in the same direction to the southern side of and adjacent to that of CTS No.1533. There is open space in south north lane towards eastern side of and adjacent to the suit properties bearing CTS No.1535 and 1536 and that which is situated to eastern side of and adjacent to the property bearing CTS No.1533 from a passage to have engress and ingress from the public road situated to southern side of and adjacent to the property of CTS No.1533. Evidence of the appellant supported by this position and by the sale deeds produced at Exh.79 and at Exh.81 to Exh.83, clearly established that the open space which is in the shape of lane situated to southern side and adjacent to the suit properties bearing CTS No.1535 and 1536 and towards eastern side of and adjacent to the portion of wall marked by A-B letters, it for the purpose of common use and

> enjoyment by the Appellant and Respondents. Case made out by the Respondent No.1 does not appear to be probable, convincing and trustworthy. I, therefore, answer the point in negative. "

3. The Appellate Court also recorded a finding that the extinguishment of the right of easement was not established and therefore the Respondents had a right to disturb the wall erected between the points A and B.

4. The findings of the Appellate Court are based on appreciation of oral and documentary evidence on record and in particular the evidence in the form of the sale deed. The said findings are not shown to be perverse. No fault can be found with the said findings. Second Appeal is dismissed with no order as to costs.

Judge.